No. 79-1157

In the Supreme Court of the United States

October Term, 1979

EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County,
Petitioners,

vs.

LA SALLE NATIONAL BANK, Trustee under Trust No. 44891,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION

JAMES L. FOX
DONALD P. COLLETON
One East Wacker Drive
Chicago, Illinois 60601
(312) 644-8500
Counsel for Respondent

Of Counsel
ABRAMSON & FOX
One East Wacker Drive
Chicago, Illinois 60601
(312) 644-8500

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals (App. 1a-19a) is reported at 604 F2d 530 (7th Cir. 1979). The opinion of the district court (App. 20a-21a) is not officially reported.

Jurisdiction

The decision of the Court of Appeals was entered on August 24, 1979 (App. 1a), the petition for rehearing and

suggestion for rehearing *en banc* was denied on October 30, 1979, and the instant petition for writ of certiorari was filed on January 26, 1980. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the Court of Appeals was correct in holding that the denial of interest on tax refunds by the Illinois courts renders the state remedy inadequate within the meaning of 28 U.S.C. §1341, thereby removing its bar to federal jurisdiction in an injunctive proceeding.

Whether the Court of Appeals was correct in holding that the availability of an action under 42 U.S.C. §1983 in the Illinois courts does not bar federal jurisdiction over a section 1983 action alleging constitutional deprivations arising from an illegal tax action.

STATEMENT OF THE CASE

a. Earlier Proceedings

Taxpayer, Patricia Cook,[1] the owner of an apartment building in the all black, economically depressed Village of East Chicago Heights in Cook County, Illinois, brought this action in the United States District Court for the Northern District of Illinois under 42 U.S.C. §1983 seeking a preliminary and permanent injunction against the respondent County Collector from proceeding to judgment and order of sale against and from selling her property for unpaid 1977 Cook County real estate taxes which she alleged to be assessed at over three times the legal amount, viz., the amount at which property in her class was assessed

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[1] Although La Salle National Bank, Trustee under land trust No. 44891 is the named respondent, Patricia Cook, as sole beneficiary under the Trust, is the real party in interest.

and taxed generally in the County. Jurisdiction was invoked under 28 U.S.C. §1343(3). The district court denied taxpayer's motion for a preliminary injunction and dismissed the case, holding 28 U.S.C. §1341 a bar to federal jurisdiction. (App. 20a)[2] That court granted an injunction pending appeal. Fed. R.Civ.Proc. 62(c). The Seventh Circuit reversed, 604 F.2d 530 (1979).

b. Facts Assumed True for Purposes of Appeal[3]

On January 1, 1977, the assessment date for levying of 1977 real estate taxes, taxpayer alleged that her property had a fair cash value of $46,000 and, if assessed in accordance with the Illinois statutes and Cook County ordinance, should have been assessed at 33% of its fair cash value or approximately $15,000.00. Petitioner-Assessor, however, assessed the property at $52,150, over three times the legal amount. As a result, the taxes levied against the property, viz., $6106, were about three and a half times the proper and legal taxes of $1775.

The Cook County Assessor knowingly as official policy or as governmental custom has maintained a system of assessment in Cook County which has produced egregious disparities in the ratios between the assessed valuations and the fair cash values of real properties. Over-assessments are greater in frequency and size in older communities in which property is owned and inhabited primarily by members of racial minority groups and the economically disadvantaged.

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[2] References to the Appendices are to Petitioners' Appendix included with their Petition.

[3] The well pleaded factual allegations of respondent-plaintiff's complaint are taken as true. *Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-175 (1975), Fed.R.Civ.P. 12(b)(1).

In 1977, as well as in each of the preceding three years (in which her property similarly was overassessed), respondent sought administrative relief from the Board of Tax Appeals of Cook County. In each of those years, the Board referred her complaint to the Assessor for recommendation, and in each year the Assessor recommended "no change" in the assessment. The Board denied taxpayer's petition for administrative relief each year.[4]

Having been denied administrative relief, taxpayer's only remedy at law was to pay the full amount of the tax claimed by the county collector (defendant-petitioner Rosewell, Treasurer of Cook County) pursuant to the assessor's assessment, and thereafter to object and sue for refund at the collector's annual Application for Judgment in the Cook County Circuit Court. See 120 Ill.Rev.Stat. §§675, 716. The customary delay in receiving refunds in a suc-

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[4] Petitioners' recitation in their Statement of the Case (Petition 6, fn.), of administrative and judicial remedies for overassessments available to Illinois taxpayers, is irrelevant. Notwithstanding the mandates of the Illinois Revenue Act of 1939, Chapter 120, Illinois Revised Statutes, 594, 598, 608, taxpayer has continually been denied administrative relief under those statutory provisions. Taxpayer, as noted, unsuccessfully sought administrative relief in 1974, 1975, 1976 as conditions precedent to her judicial actions. *C.f., People ex rel. Korzen* v. *Fulton Market Cold Storage Company,* 62 Ill.2d 443, *cert. denied,* 429 U.S. 833 (1976). She did so also in 1977 prior to bringing the suit below; and, notwithstanding the pendency of this suit, 1978 complaints filed before both the Assessor and Board of Appeals of Cook County proved fruitless, whereupon she again sought relief in a now pending suit in the District Court, 79 C 4864. See also *Fulton Market Cold Storage Company* v. *Cullerton,* 582 F.2d 1021 (1978). Nor is injunctive relief available to taxpayer in the state courts. As petitioners admitted in their Petition for Rehearing in the Seventh Circuit: "The facts pleaded in the complaint show that the taxpayer is not entitled to equitable relief under Illinois law. See *Clarendon Associates* v. *Korzen,* 56 Ill.2d 101 (1973)." (Pet. Rehearing, 3, fn.)

cessfully prosecuted tax refund suit is two years. Under Illinois law, no interest may be paid to a successful claimant who has secured the refund of real estate taxes paid under protest.[5]

In three successive Circuit Court actions taxpayer pursued her legal remedy for 1974, 1975 and 1976 tax refunds and ultimately received these refunds for all three years in May, 1978. She had been required to pay illegally exacted taxes in the approximate amounts of $4,600 for 1974, $3,650 for 1975, and $3,950 for 1976, these being the amounts of refunds. The Court found over and above the taxes justly due. For the three, two and one year delays, respectively, given 8% interest (the average prime rate over the three-year period), she lost approximately $2,000 because of her inability to use money which ultimately was deemed to be rightfully hers.

In her suit at bar, taxpayer contends that approximately $4,300 of her 1977 tax bill of $6,106 is an illegal overcharge and that in order to pursue the State remedy she would be forced to pay the $4,300, with no possibility of receiving interest on a refund, along with her correct tax payment. Rather than paying her 1977 taxes under protest and suing for a refund of $4,300.00, on September 19, 1978 taxpayer filed the within action in the district court seeking to enjoin collection procedures for the illegal portion while standing ready to pay such just taxes as the district court may find to be due.

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[5] Petitioners referral to and distinction with respect to pre-judgment interest in their Statement requires clarification. The order of refund in the Illinois statutory procedure does not provide for interest on the refund during the period from the date of payment of taxes to the date of order of refund; nor does the order of refund itself, unlike a judgment, bear interest for the not inconsiderable period from the date of its entry by the Court until the refund is paid by the County Collector. 120, Ill.Rev.Stat., §§675, 716.

(Emphasis added unless otherwise indicated)

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Correctly Held That the No-Interest Refund Remedy in the Illinois Courts is Not Plain, Speedy and Efficient, Thus Removing the Bar of §1341 to Federal Jurisdiction of Respondent's Claim

There is no doubt that the tax discrimination complained of by respondent is constitutionally offensive, *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20 (1907); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923); *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350 (1918), and remediable in an action under Section 1983. *Garrett* v. *Bamford*, 538 F2d 63 (3rd Cir.), *cert. denied*, 429 U.S. 977 (1977); *Fulton Market Cold Storage Co.* v. *Cullerton*, 582 F2d 1071 (7th Cir. 1978), *cert. denied*, 429 U.S. 1121 (1979); *Weissinger* v. *Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971) (three judge court). It is equally well settled that Section 1983 offers a "*uniquely federal*" remedy, *Mitchum* v. *Foster*, 407 U.S. 225, 239 (1972), having been passed to afford "a federal right *in federal courts*". *Monroe* v. *Pape*, 365 U.S. 167, 180 (1961). Federal courts, when properly appealed to under Section 1983 or upon any other federal basis, have a "virtually unflagging obligation to exercise" their jurisdiction, *Colorado River Water Conservation District* v. *U.S.*, 424 U.S. 800, 817 (1976), for the "right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied." *Willcox* v. *Consolidated Gas Co.*, 212 U..S 19, 40 (1909); *New Jersey Education Association* v. *Burke*, 579 F.2d 764, 771 (3rd Cir. 1978), *cert. denied*, 439 U.S. 894 (1974). If, therefore, respondent

does not have a plain, speedy and efficient remedy in the courts of Illinois, the bar of Section 1341 is removed and, as a matter of right, she is entitled to a federal forum to seek injunctive relief to remedy the constitutional deprivation visited upon her, under color of law, by the petitioning tax officials.

Under the circumstances presented by her case, neither injunctive nor declaratory relief is available to respondent in the courts of Illinois, *Clarendon Associates* v. *Korzen,* 56 Ill.2d 101 (1973); *Goodyear Tire and Rubber Co.* v. *Tierney,* 411 Ill. 421 (1952). The only remedy she can pursue is that provided by statute of paying the excessive tax in full under protest and suing for refund. 120 Ill.Rev.Stat. Sections 675, 716; *Clarendon, supra.* Under this statutory remedy interest, not having been authorized by statute, cannot be paid on refunds:

> "We are of the opinion that the silence of our refund statute on the question of interest discloses a legislative intention to deny it. Accordingly, we conclude that plaintiff is not entitled to interest in the absence of a statute imposing that liability." *Lakefront Realty Corp.* v. *Lorenz,* 19 Ill.2d 415, 423 (1960).

See also *Chrysler Corp.* v. *Gunderson,* 77 Ill.App.3d 558, 560-1 (1979). Nor does this denial of interest "render the remedy inadequate so as to justify equity in assuming jurisdiction." *Clarendon, supra,* 56 Ill.2d at 109. The Court of Appeals has, in Part A of its opinion, dealt extensively and cogently with the issue of the inadequacy of a remedy not affording interest on refunds (App. 6a-12a). The reasons given there amply support its conclusion that Illinois' no-interest remedy is not plain, speedy and efficient.

That conclusion does not, as petitioners suggest (Pet. 15), conflict with *Bland* v. *McHann,* 463 F.2d 21 (5th Cir. 1972). The allegation in *Bland* that "Mississippi law makes

no provision for the recovery of interest on illegally assessed taxes", at 28, n. 24, was not discussed by the court in its opinion and, unlike here, formed no part of the *ratio decidendi.* Rather, in *Bland,* the court found that Mississippi statutes provided adequate remedies, including a means for administrative hearings of taxpayer assessment objections and *de novo* appeals thereof to the circuit court, a procedure not available to Illinois residents of Cook County. See 120 Ill. Rev. Stat. §592.1-5. Patently, there is no conflict.

Notably, the issue here is not whether the granting of interest is a matter of statute and not of right, nor whether Illinois' adherence to a no-interest rule is proper (Pet. 15). *Lakefront, supra,* 19 Ill.2d at 423. Illinois is concededly free to follow such a rule. But in doing so, Illinois must recognize that it imposes substantial economic burdens which affect the adequacy of the remedy it provides. As "the remedy's diseconomies" (App. 11a) in *Georgia RR* v. *Redwine,* 342 U.S. 299 (1952) sufficed to render a procedure requiring financially burdensome multiple suits inadequate, so here a refund procedure that takes two years and disallows interest is inadequate because of the "undue costs" it entails (App. 11a).[6]

In fine, it is a subversion of reality for a body politic to maintain, in the economic milieu of the day, that a tax refund procedure which requires payment in full of the illegal portion of a tax, as a condition precedent to obtaining judicial review and relief, and denies interest on the money refunded, the interest on which the body has reaped for two years, constitutes an adequate, a plain, speedy and

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[6] Contrary to petitioners' view (Pet. 17), it was the undue economic burdens of the state remedy at law and not the fact that the railroad might be exempt from taxation which rendered the state remedy inadequate in *Redwine.* 342 U.S. at 303.

efficient remedy.[7] Is it not indeed harsh treatment of the citizens who, suffering a constitutional deprivation of their substance by public officials acting under color of law, have a dollar of that substance returned two years later worth but seventy-five cents under today's double digit inflation? And then to be told by the highest court of their state that the remedy the *parens patriae* affords them, is adequate? Indeed, if Judge Learned Hand's analysis of the inadequacy of such procedure in 1924 was valid, *Proctor & Gamble Co.* v. *Sherman,* 2 F2d 165, 166 (S.D. N.Y.) cited by the court below, 604 F2d at 536; App. 12a, how much more so today!

II.

The Court of Appeals Correctly Held that the Availability of An Action Under 42 U.S.C. §1983 in the Illinois Courts Does Not Bar Federal Jurisdiction Over a Section 1983 Action Alleging Constitutional Deprivation Arising From an Illegal Tax Action

Petitioners seek to avoid the holding of the Court of Appeals by readvancing their argument, made in that court, that the possibility of state court jurisdiction over a 1983 action preserves the bar of Section 1341. The contention is without merit.

In urging rehearing, petitioners candidly stated to the Court of Appeals: "The facts pleaded in the complaint show that taxpayer is not entitled to equitable relief under

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[7] As noted, §675 of Chap. 120 Ill. Rev. Stat. permits the County Collector to withhold from the taxing bodies certain taxes paid under protest, and to invest them pending judicial resolution of the disputed assessments. Not only does this financial benefit accrue to the County from the date of payment to date of order of refund, but accrues from the date of the order to date of actual payment, a time period averaging from 6 weeks to 2 months.

Illinois law." (Pet. for Rehg. 3, n.). If this is so, it is difficult to see how the inadequacy of the Illinois remedy will be avoided by respondent's resort to a state court proceeding even under Section 1983. See *Chrysler Corp.* v. *Gunderson,* 77 Ill. App. 3d 558, 560-561 (2nd Dist. 1979), where the Court refused to grant injunctive relief, notwithstanding reference to the rule announced in the court below stating:

> "This holding [in LaSalle] has no effect on whether a remedy is adequate for the purposes of relief sought in Illinois courts."

Moreover, for petitioners' argument to stand, this Court must rule that, upon respondent's invocation of Section 1983, the state court must unwillingly set aside its settled rules for refusing equitable jurisdiction in tax cases, see *Clarendon Assn.* v. *Korzen, supra; Chrysler, supra,* open its door, perforce, to injunctive relief in every tax discrimination case, also *contra* holdings of Illinois courts for over a hundred years (see cases, Pet. 7-8) and literally sit as the federal district court in such cases. Notwithstanding "the silence of [Illinois'] refund statute . . . discloses a legislative intent" to deny interest on refunds, *Lakefront Realty Corp.* v. *Lorenz,* 19 Ill. 2d 415, 423 (1960), under petitioners' approach Illinois courts presented with a 1983 claim would be required not only to award interest as an element of damage in damage actions, *Fulton Market Cold Storage Co.* v. *Cullerton, supra,* but also to allow interest on judgments in the annual statutory refund proceeding. 120 Ill. Rev. Stat. §§675, 716. Illinois would lose the discretion which she now enjoys to *choose, U.S. and E.I. du Pont de Nemours & Co.* v. *Livingston,* 179 F. Supp. 9, 15 (E.D. S.C. 1959) (three judge court), *aff'd per curiam,* 364 U.S. 281 (1960) not to afford an adequate remedy. Plainly such results would maximize rather than minimize federal-state friction, upset the delicate interests of comity bal-

anced below (App. 12a), and emasculate the policy considerations behind Section 1341.[8]

Finally, whatever else may be said about the question of whether the Illinois courts will entertain 1983 actions and do an about-face on their long-asserted right to deny equitable relief, it cannot seriously be argued that the course the state court would take under such circumstances is settled or sufficiently free from doubt as it is required to be to render the Illinois remedy adequate. *Hillsborough* v. *Cromwell,* 340 U.S. 620, 629 (1924); *Tully* v. *Griffin,* 429 U.S. 68, 76 (1976); *Garrett* v. *Bamford, supra,* 538 F2d at 70; *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 523 F2d 439, n.4 (7th Cir. 1975), *rehearing denied, cert. denied,* 424 U.S. 959 (1976). On the contrary, if anything is settled, it is that the Illinois courts will *not* apply federal equity principles when presented with a Section 1983 case involving allegation of discriminatory taxation by local taxing bodies.

As an example, in *People ex rel. Korzen* v. *Fulton Market Cold Storage Company,* 22 Ill. App. 2d 3rd 1088 (1st Dist. 1974), *rev'd,* 62 Ill. 2d 443, *cert. denied,* 429 U.S. 833 (1976), a taxpayer sought a refund from the Illinois courts

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[8] Petitioners err in saying the decision below allows "any and every Illinois taxpayer desirous of litigating tax assessments" (Pet. 7) access to the federal court. To enter the federal court, a taxpayer must allege a constitutional deprivation worked under color of law and, according to petitioners, these jurisdictional prerequisites will "seldom" arise (Pet. 7). If, on the other hand, the 1100 valuation objections noted by petitioners (Pet. 12, n.) do involve constitutional discrimination, serious doubt would exist about the constitutionality of the Cook County assessing procedures and the need of federal court protection could not be gainsaid. In any event, it is difficult to see what policy interest behind Section 1341 would be served by flooding the Illinois courts with Section 1983 injunction suits.

in the statutory proceeding alleging, *inter alia,* a count under Section 1983. The taxpayer raised the 1983 claim in the trial court and argued it in both the Illinois Appellate and Supreme Courts, contending that because a federal cause of action under Section 1983 was involved, the federal doctrine controlled that in a civil rights action the state remedy "need not be first sought and refused before the federal one is invoked". *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961). 22 Ill.App.2d at 1089; see *Carter* v. *Stanton,* 405 U.S. 669 (1972); *Damico* v. *California,* 389 U.S. 416 (1967); *McNeese* v. *Board of Education,* 373 U.S. 668 (1963). The Illinois Supreme Court, however, squarely held that the Illinois doctrine requiring exhaustion governed and dismissed taxpayer's complaint.[9] 62 Ill.2d at 446-447. There is no reason to believe the Illinois courts would take a different approach here and put aside the state rule that a no-interest remedy is adequate and adopt the contrary federal rule.[10]

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[9] When a federal court was presented with Fulton's Section 1983 claim, it applied the federal rule on exhaustion and sustained the taxpayer's complaint. *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071, 1080 (7th Cir., 1978).

[10] The ruling below does not "always transfer the risk of taxpayer insolvency to the government" (Pet. 10). Respondent has offered to pay the just portion of the disputed 1977 tax so that no delay in the collection of proper taxes would occur. In *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 523 F.2d 439 (7th Cir. 1975) (Pet. 10) taxpayer contended that the Assessor's discriminitory practices were rendering its property unmortgageable and unsaleable, thus creating the risk of insolvency to which petitioners refer.

CONCLUSION

It is clear that Illinois' no-interest, no-injunction remedy is inadequate. Not only does it visit "undue costs" (App. 11a) on taxpayers, but it gives the Cook County Assessor an economic incentive to disregard his duties. Indeed, respondent has been over-assessed now five years in a row and still cannot get adequate relief in the state courts. Hence, this case is exactly what Section 1983 is all about for it has become certain that only a federal cause of action heard in a federal court will thwart petitioners' malicious abuse of the taxing power under color of law. The Court of Appeals was correct in holding the state remedy inadequate and the bar of Section 1341 avoided. The Petition for Certiorari should be denied.

Respectfully submitted,

JAMES L. FOX
DONALD P. COLLETON
Counsel for Respondent

Of Counsel:
ABRAMSON & FOX
One East Wacker Drive
Chicago, Illinois 60601
(312) 644-8500